

## **10560                      Proceedings after Compliance Requirements Have Been Determined**

**10560.1                      Overview:** In the course of investigating compliance requirements, the compliance officer will communicate with all parties, eliciting respective positions on compliance issues, answering questions, and establishing facts. Although seeking cooperation and assistance from the parties, the compliance officer will make it clear to the parties that the Region is ultimately responsible for determining compliance requirements. From the investigation, the compliance officer will reach conclusions as to the compliance requirements of each case. At this point, it is generally appropriate to advise the parties in writing of these requirements, to avoid misunderstandings as to what the requirements are, and to provide both charging party and respondent the opportunity to dispute any conclusion. The letter should fully set forth the basis for the conclusions the compliance officer has reached, including facts which have been established and arguments considered.

*For example,* a letter advising the parties of backpay due under a Board order should set forth information concerning gross backpay and interim earnings on which the backpay determination is based. It should include wage rates and work schedules used to calculate gross backpay, as well as the method used. It should present interim earnings, and should address any mitigation issues raised. An appropriate sample letter is found in Appendix 4.

After advising the parties of his or her conclusions regarding compliance requirements, the compliance officer should follow up with the parties, confirming that they accept the conclusions, or identifying areas of dispute.

The following Compliance Manual sections set forth procedures for subsequent actions when compliance requirements are undisputed by the parties, when compliance requirements are disputed by any party, and when the respondent fails to comply.

**10561                      Compliance Requirements Undisputed:** When all parties agree with the compliance officer's conclusions regarding compliance requirements, the compliance officer is responsible for ascertaining that the requirements have been accomplished, and, at the appropriate time, recommending that the Regional Director close the case.

## **10561–10564.1**

Note that Compliance Manual section 10635 discusses procedures for collecting and disbursing backpay.

Compliance Manual section 10685 sets forth procedures for reporting and closing cases on compliance.

**10562 Compliance Requirements Disputed:** Compliance requirements are often disputed. The following sections provide guidelines in settling disputes, procedures in the event of noncompliance, and formal proceedings for determining compliance requirements that cannot be settled.

### **10563 Settlements**

**10563.1 Overview and General Standards for Settlement:** It is the policy of the Board and the office of the General Counsel to resolve disputes through negotiated settlements. See Unfair Labor Practice Proceedings Manual section 10124.1. Settlements can benefit all parties, eliminating the expense and risk of litigation. Settlements also save Agency resources and effectuate basic goals of the Act, reducing conflict and improving relations. Thus, settlement of disputed compliance issues should be pursued in all cases.

Although settlement of disputed compliance issues is desirable, concessions not warranted by the circumstances of the case should not be made. The concept of settlement constitutes recognition of the fact that in some cases there are reasonable differences about the amount due when comparing the maximum, which may with fair bona fide argument be claimed for the discriminatee, and the minimum, which may in good faith be fairly argued for the respondent.

### **10564 Settlement Standards Regarding Backpay**

**10564.1 Authority of Regional Directors to Accept Settlements:** Backpay is the most frequently disputed compliance issue, as well as the most complex. When the following criteria are met, Regional Directors are authorized on behalf of the Board to accept settlements of backpay without Division of Operations Management authorization:

- a. The backpay computation is based on an appropriate method and the backpay settlement is at least 80 percent of full backpay due.
- b. All parties, including the discriminatees, agree to the settlement.

### **10564.1–10564.3**

- c. There have been no prior findings of similar violations against the respondent, and no other current unfair labor practice charges pending that are not included in the settlement.
- d. All discriminatees entitled to reinstatement have received valid offers or have waived reinstatement.
- e. All other compliance requirements have been or will be met.
- f. The Regional Director believes that the settlement fully effectuates the purposes of the Act.

**10564.2 Division of Operations Management Authorization Required:** If any of the above criteria are not met, Division of Operations Management authorization must be obtained for a Region to accept a settlement. In emergencies, clearance may be obtained by telephone from the appropriate Assistant General Counsel.

Whether requests for clearance be made by memorandum or by telephone, the Region should state the full amount of backpay, the amount to be paid under the settlement, the respondent's reasoning in support of the proposed settlement, the position and reasoning of any opposing charging party or discriminatee, and the Region's recommendations and reasoning for accepting or rejecting the proposal.

Compliance Manual section 10680 summarizes specific situations in which Division of Operations Management clearance is required.

**10564.3 Settlement Reached by all Parties:** The compliance officer should take an active role in settlement discussions. On occasion, however, respondents will negotiate directly with charging parties or discriminatees, and arrive at a settlement which they will present to the Region for approval. The Region should arrive at its own conclusions concerning the acceptability of any proffered settlement, and seek agreement to changes that the Region might deem appropriate. It should be kept in mind, however, that the Board retains ultimate authority to approve compliance settlements involving Board orders, and that it may accept a settlement reached by the parties over the objections of the Region.

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Recent decisions indicate that the Board, in evaluating whether to accept a settlement in the face of a Region's objections, will consider the position of the Region, as well as the following factors:<sup>91</sup>

- a. Whether the terms are reasonable in light of the violations, the risks inherent in litigation, and the current stage of litigation.
- b. Whether all parties, including the respondent, the charging party, all affected employees, and the discriminatees, had agreed to be bound by the settlement.
- c. Whether there is any indication that agreement was reached through coercion, fraud, or duress.
- d. Whether there is any respondent history of violations or breach of previous unfair labor practice settlement agreements.

**10564.4 Settlements Based on Less Than 80 Percent of Back-pay:** The standard by which settlement efforts should be guided is to obtain 100 percent of the backpay that the Region has determined to be due, or that it would allege to be due in the event a compliance specification issued. Any compromise from this standard must be warranted by the facts, law, and circumstances of the case.

Even with full agreement by the charging party, discriminatees, and other affected employees, the Region must obtain authorization from the Division of Operations Management before accepting a settlement of backpay that represents less than 80 percent of what it has determined full backpay to be.

By requiring such clearance it should not be inferred that settlements that constitute more than 80 percent but less than 100 percent of that claimed in the backpay specification may be routinely accepted. The 80-percent figure constitutes nothing more than a trigger for Division of Operations Management clearance and should not be construed as authorizing settlements for less than 100 percent without good cause.

Should the settlement be 80 percent or more of the net backpay claimed in the specification or which would have been claimed if the specification

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<sup>91</sup> See *Independent Stave Co.*, 287 NLRB 740 (1987); and *American Pacific Concrete Pipe Co.*, 290 NLRB 623 (1988). See also *Longshoremen ILA Local 1814 (Amstar Sugar)*, 301 NLRB 764 (1991), involving a post-ALJD non-Board settlement.

#### **10564.4–10564.7**

had issued, but represent more than minor concessions, the closed case report, a copy of which should be forwarded to the Region's Assistant General Counsel, should set forth the amount collected and the amount owed, and attach a copy, if applicable, of any memorandum from the Division of Operations Management authorizing settlement or closure of the case.

#### **10564.5 Settlement Based on Preliminary Estimates of Backpay:**

In backpay cases involving large numbers of discriminatees, long backpay periods, or other complexities, as well as in any case where expeditious treatment is essential to pursue settlement, the compliance officer should prepare an estimate of backpay as a basis for settlement.

The method of estimation will depend on circumstances of the case, but must be consistent with standard methods of determining backpay. All facts of the case must be taken into account, and all components of gross backpay considered.

The goal of estimating backpay is to present to the parties a reasonable assessment of liabilities that will serve as a basis for immediate settlement of the case. The parties should be clearly informed that backpay amounts are estimates.

**10564.6 Concessions Based on Mitigation Issues:** Respondents frequently contend that a discriminatee has failed to meet his or her obligation to mitigate, and that net backpay due should be reduced accordingly. Regions should refrain from resolving borderline willful idleness contentions against discriminatees, and should not hesitate to submit settlements based on concessions over mitigation to the Division of Operations Management for approval even when all other criteria for approving the settlement have been met.

See Compliance Manual section 10545 regarding mitigation.

#### **10564.7 Respondent Requests to Question Discriminatees:**

The respondent's counsel may request as a prerequisite to agreeing to a settlement that the Regional Office make discriminatees available to counsel for questioning concerning their interim earnings and search for work. This should not be agreed to. There can be no deviation from this rule unless prior authorization is received from the Division of Operations Management. This type of investigation can be extremely demoralizing to the discriminatee

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and is better and more fairly conducted under the judicial safeguards of a hearing.

**10564.8 Reinstatement:** Most cases that involve backpay also require reinstatement. Respondents often propose backpay settlements conditioned on discriminatee waiver of reinstatement. Although such offers should be communicated, the Region should not encourage discriminatees to waive reinstatement.

Discriminatees are not required to accept reinstatement, and rejection of reinstatement does not affect the backpay determination except by tolling the backpay period. Settlement may be based on appropriate backpay and a waiver of reinstatement should the discriminatee not seek reinstatement. Such waivers should be clear and in writing. Regions may pursue settlement negotiations to resolve backpay and reinstatement when both issues are disputed.

The Region should seek clearance from the Division of Operations Management before accepting offers of more than 100 percent of backpay as an inducement to discriminatees to waive reinstatement.

In rare cases when convincing evidence of unsuitability for employment is proffered, settlements in lieu of reinstatement should not be accepted, unless the Regional Director, after clearance through the Division of Operations Management, agrees that under the particular circumstances such a settlement effectuates the policies of the Act.

**10564.9 Missing Discriminatees:** Particularly in cases involving more than one discriminatee, it is important that resolution of the case not be impeded because of missing discriminatees. Backpay due missing discriminatees may be determined using the methods set forth in Compliance Manual section 10548.4.

Backpay for a missing discriminatee should not be collected in the form of a check payable to the discriminatee, but rather should be held in escrow. See Compliance Manual section 10640 regarding escrow accounts, and section 10645.3 regarding disbursement of backpay from an escrow account when a missing discriminatee is located.

See Compliance Manual section 10646 regarding the extinguishment of a missing discriminatee's backpay entitlement after respondent compliance has otherwise been accomplished.

## 10564.10–10564.12

**10564.10 Uncooperative Discriminatees:** Backpay and reinstatement due an uncooperative discriminatee may be compromised or eliminated in reaching a resolution of a case that results in substantial compliance with a Board order or with appropriate remedial standards. This will only be done when it is known that the discriminatee is not missing, when there is nothing to suggest that the refusal to cooperate serves to subvert the Board's processes, and when the discriminatee has been given written notice of the consequences of his or her refusal to cooperate.

**10564.11 Discriminatee Waivers and Releases:** Respondents may seek to have discriminatees and/or charging parties execute waivers or releases as part of, or as an adjunct to, a compliance settlement. In determining the overall acceptability of such settlements, the Region should carefully evaluate the propriety of any waivers or releases, particularly where they could be read to foreclose the filing of unfair labor practice charges in future, unrelated matters.<sup>92</sup>

**10564.12 Installment Payments:** The Regional Director may accept installment payment of backpay when satisfied that the respondent's financial position would be seriously jeopardized by full immediate payment.

See Compliance Manual section 10603 for a detailed treatment of this subject, including the requirement that Regions should normally insist, as a condition of accepting installment arrangements, on such security provisions as are commonly required by creditors in ordinary business transactions to protect against default, insolvency, and bankruptcy. Before agreeing to installment payments, Regions should review and observe the provisions in that section. See also Compliance Manual sections 10600, et al., with respect to monitoring and investigating a respondent's ability to pay.

Settlements providing for installment payments should also provide for payment of interest during the installment period.

Note also that if the Region has reason to believe that assets have been, or are being, siphoned off; that all income is not being reported; or that the respondent is acting to evade liabilities; contempt proceedings, or other proceedings to protect the Board's interest in securing backpay, may be warranted. In these situations, Regions should consult with Contempt Litigation Branch.

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<sup>92</sup>See *Copper State Rubber*, 301 NLRB 138 (1991).

#### **10564.12–10564.13**

Note: It must be kept in mind that any transfer of funds from a respondent within 90 days before it files a bankruptcy petition can, in certain circumstances, be voided and required to be returned to it under Section 547 of the Bankruptcy Code.

**10564.13 Settlements Involving Joint and Several Liability:** In general, in cases with more than one respondent and joint and several liability, payment should be sought on an equal share basis.

When the joint and several liability of an employer and union pertains solely to a dues reimbursement remedy, and the two agree that the union alone shall make the reimbursement, the settlement should be accepted without efforts to obtain payment from the employer unless there are unusual circumstances.

In cases where one respondent is willing to comply by paying its proportionate share, but the other respondent refuses to comply, the proffered compliance should be accepted. The acceptance, however, should be with the stipulation that should efforts to collect the remaining backpay from the other respondent fail, the complying party will still be liable for the remainder due. Further, the complying respondent should be informed that should backpay proceedings be instituted, it will be named as a party-respondent.

Should one respondent offer to comply by paying in full the backpay liability, the offer should be accepted only after efforts have been made to secure equal payment from all respondents. The offer may be rejected if it appears appropriate to pursue payment from the other respondent for any reason.

*For example*, the other respondent may have a history of unlawful conduct, or its payment of backpay may appear to have a more compelling remedial effect in the circumstances of the case.

In the event one respondent becomes insolvent, full payment of the liability from the other respondent is appropriate.

In cases arising from a Board order or a court judgment, Division of Operations Management authorization is required for a Region to accept a backpay settlement on anything other than an equal proportionate basis. Requests for such clearance must include an account of efforts to secure equal payment and why departure from equal payment is warranted.



## 10564.14–10564.16

**10564.14 Settlement Conference:** The compliance officer may suggest a conference as a means of resolving disputed backpay issues. As appropriate, the Regional Director or a designated manager may wish to participate in the conference as a means of emphasizing the importance of settlement efforts.

At such a conference, the contentions of the respondent should be carefully assessed and, when they have merit, should form the basis of concessions. There is rarely a unique approach to backpay computations, and reasonable points made by the respondent should be considered in reaching agreement on amounts due.

**10564.15 Settlement Discussions Should Not Serve to Delay Compliance Proceedings:** Although settlement should be pursued at all stages of unfair labor practice proceedings, the compliance officer should guard against respondent efforts to delay proceedings in the guise of cooperation. Normally, inquiries should be in writing and should carry a deadline. Failure to meet a deadline should meet with a firm and prompt written response from the Region.

In general, settlement discussions should not be allowed to delay compliance proceedings. Enforcement proceedings should normally be recommended, and a compliance specification prepared and issued in accord with operational goals even while settlement efforts continue.

See Compliance Manual section 10672 regarding compliance operational goals.

**10564.16 Concessions Proffered During Failed Settlement Discussions Are Not Binding:** Settlement discussions conducted by the Regional Office are not binding on the Region or the Board in the event settlement fails.<sup>93</sup> The Region may withdraw settlement proposals in the face of changing circumstances. When settlement efforts have failed, the Region should seek full backpay in the course of further proceedings.

Note, however, that the Region's position on backpay issues should reflect valid points made by the respondent during the backpay investigation and settlement discussions.

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<sup>93</sup> See, for example, *NLRB v. Armstrong Tire Co.*, 263 F.2d 680, 681–682 (5th Cir. 1959), enf. in part 119 NLRB 353, 354–356 (1957).

## **10565–10566.2**

### **10565                    Complaints of Noncompliance**

**10565.1                    Overview:** When a respondent subject to compliance requirements of a settlement agreement, Board order, or court judgment engages in continuing or new unlawful conduct, the conduct may constitute noncompliance or an independent violation of the Act.

Complaints of noncompliance or of new unlawful conduct may be made while the respondent is subject to active compliance proceedings or after the case is closed on compliance. Provisions of settlement agreements, Board orders, and judgments remain in effect even after the case has been closed on compliance.

**10566                    Complaint of Noncompliance with an Unenforced Board Order:** The compliance officer is responsible for investigating any complaint of noncompliance. The complaining party should be asked to submit whatever evidence is available to support the complaint.

**10566.1                    Criteria for Filing a New Unfair Labor Practice Charge:** Whether a new charge should be filed depends on the circumstances of the case. Unless the matter complained of is clearly encompassed by the compliance requirements of the Board order, the better practice is to advise the party making the complaint to file a new unfair labor practice charge. The reason for this is that if the newly alleged unlawful conduct is beyond the scope of the remedial provisions of an outstanding settlement agreement or Board order, unfair labor practice charges to address such new conduct must be filed within the 10(b) period.

*For example,* a Board order has issued finding that the respondent unlawfully terminated Jane Doe. John Smith, not involved in the proceedings that resulted in the Board order, is now terminated, allegedly for union activities. A new unfair labor practice should be filed over Smith's termination. Smith's termination, if unlawful, may or may not constitute noncompliance with the Board order, depending on the provisions of the Board order, the circumstances of the two terminations, and other factors.

**10566.2                    Procedures When a New Unfair Labor Practice Charge is Filed:** If the Region finds merit to a new unfair labor practice charge that may constitute noncompliance with an unenforced Board order, the Region should attempt to resolve the matter, and failing that, determine whether a new complaint is warranted (e.g., would a new unfair labor practice proceeding lead to remedies beyond those provided by the existing

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Board order). In case of doubt, Regions may consult with the Division of Enforcement Litigation as to the propriety of issuing a new complaint.

In addition, the Region should promptly forward a memorandum to the Division of Operations Management containing a recommendation regarding whether enforcement proceedings should be initiated with respect to the existing Board order.

**10566.3 Procedures When a New Unfair Labor Practice Charge Is Not Filed:** When a complaint of noncompliance is made without the filing of a new charge, it should be investigated as a compliance matter. The compliance officer should advise the parties of the results of the compliance investigation regarding the complaint as well as other compliance requirements. The compliance officer should attempt to resolve the complaint, along with any other disputed compliance issue, through voluntary settlement.

If settlement efforts fail, and if it is determined that the respondent has complied, the case should be closed at the appropriate time. If the charging party objects, see Compliance Manual section 10575 with respect to its right to a compliance determination. If it is determined that the respondent is not complying, enforcement proceedings as set forth in Compliance Manual section 10585 are warranted.

**10566.4 Noncompliance with an Unenforced Board Order Originating in Another Regional Office:** When the investigation of a charged party's prior history reveals that meritorious allegations appear to be noncompliance with remedial provisions of an unenforced Board order that originated in another Regional Office, the Regional Director investigating the new charge should contact the Region where the Board order originated and solicit the views of the Regional Director concerning the appropriateness of enforcement proceedings in light of the new charge. The Regional Director investigating the new charge should submit to the Division of Operations Management a memorandum containing those views and a recommendation concerning the appropriateness of enforcement proceedings. Absent authorization, the Region should not proceed to issue complaint or to settle those allegations of the charge that may constitute noncompliance with the Board order.

## **10575–10575.2**

### **10575 Compliance Determinations**

**10575.1 Overview:** Final authority concerning compliance with remedial provisions of its orders rests with the Board itself.<sup>94</sup> Regional Directors exercise authority in compliance proceedings as agents of the Board.

Section 102.52 of the Board’s Rules and Regulations provides that a charging party may appeal a Regional Director’s determination that a respondent has complied with the remedial provisions of a Board order by filing an appeal with the General Counsel. If the General Counsel denies the appeal, the charging party may file a request for review of that action with the Board.

The appeal procedure is only available to charging parties, and not to discriminatees who are not also a charging party, unless the discriminatee has intervened in the case pursuant to Section 102.29 of the Board’s Rules and Regulations. Although nonparty discriminatees lack appeal rights, their interests and wishes should be considered by the Region in determining compliance requirements.

Note that in cases where a respondent contests the compliance requirements determined by the Region and will not comply with them, recourse to the Board is available through formal compliance proceedings that lead to a supplemental Board order. See Compliance Manual section 10620.

**10575.2 Issuance of a Compliance Determination:** When a charging party disputes the Region’s conclusion that compliance has been fully achieved, the compliance officer should advise the charging party that it has the right to request a written determination by the Regional Director of compliance requirements.

In response to such a request, the Region should issue a self-contained compliance determination, setting forth all facts established during the compliance investigation on which the determination has been based as well as the legal basis for the determination. It may be limited to the compliance requirements that are being disputed by the charging party. The compliance determination shall also contain the notification of the charging party’s appeal rights to the General Counsel within 14 days, and a copy of Form NLRB-5434, “Notice of Compliance Appeal.”

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<sup>94</sup> See *Ace Beverage Corp.*, 250 NLRB 646 (1980).

## **10575.2–10575.4**

As with dismissal letters, copies of the Regional Director's compliance determination should be sent to the Office of Appeals.

**10575.3 Procedures to Follow on the Appeal of a Compliance Determination:** Should the charging party appeal the Region's compliance determination to the General Counsel, it will be considered by the Office of Appeals. On receipt of a copy of the appeal, or a copy of a letter from the Office of Appeals acknowledging the appeal, the Region should promptly submit the Regional Office compliance file, or its relevant portions.

**10575.4 Procedures to Follow on Filing a Request for Review with the Board:** Should the General Counsel deny the appeal of a compliance determination, the charging party may file a request for review with the Board within 14 days.

If the charging party files a request for review, the record before the Board will normally consist only of the request for review, the Region's compliance determination, and the Office of Appeal's letter denying the appeal. For this reason, it is very important that the Region's compliance determination set forth clearly all facts on which it is based.

To ensure that the Board has before it sufficient information to rule on the request for review, the Region should carefully review it. If the Region concludes that the charging party has raised no issues not considered and discussed in the Regional Director's compliance determination and the General Counsel's denial of the appeal, it should so advise the Board as promptly as possible.

If, however, the Region concludes that the request for review raises issues not fully discussed in the documents before the Board, it should advise the Board that it will file a response, and the approximate date that the response will be filed. The Region's response may be in the form of a memorandum to the Board to which public documents may be attached to supplement the existing record. In either case, any response including attachments must be served on the charging party, and the Board must be provided with an affidavit of service.